79-177

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

PHILIP R. JACKA,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. CR78-1906

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Defendant-Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Philip R. Jacka, by his attorneys, prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Tenth (10th) Circuit entered on May 31, 1979, with mandate stayed pending Certiorari until August 11, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, which is

attached hereto as Appendix A, was filed on the 31st day of May, 1979, with mandate stayed pending Certiorari until August 11, 1979 (Appendix B). An extension of time within which to file this Petition for Writ of Certiorari was granted by the Hon. Mr. Justice Byron R. White, a copy of which is attached hereto as Appendix C.

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED AND WHY WRIT SHOULD BE GRANTED

1. Has the Court of Appeals for the Tenth Circuit created an impermissible exception to the protection from compulsory self-incrimination secured by the Fifth Amendment, whereby refusal to make disclosures requested on one's individual income

tax return can provide the basis for criminal liability notwithstanding the fact that such disclosures would have incriminated the defendant? And in this case the claims of privilege and concomitant non-disclosure made on the form 1040 by the Defendant related to information which could and would have incriminated him had he disclosed it, as conceded by the Internal Revenue Agents who testified at trial - can such a valid claim of privilege on a form 1040 which contains the Defendant's name, address and social security number be considered "tantamount to no return at all" for purposes of criminal culpability for "willful failure to file an income tax return", without grafting an incongruous and malignant excrescence onto the body of the Fifth Amendment?

There can be no doubt that there are many citizen-taxpayers who must confront the

dilemma imposed by the annual requirement of revealing personal financial data on the form 1040 of 1) impossible self-incrimination by revealing potentially incriminating information on their annual required Individual Income Tax Return form 1040, or 2) prosecution for Willful Failure to File Tax Returns prohibited by Title 26 U.S.C.§7203 because "failure to provide sufficient information ... is tantamount to no return at all." The recent holding of the United States Supreme Court in Garner v. United States, 47 L.Ed.2d 370, 96 S.Ct. 1178, 424 U.S. 648 (1976) that "if a taxpayer desires the protection of the privilege he must claim it instead of making disclosures." 47 L.Ed.2d at p.384, has encouraged taxpayers whose disclosures could constitute evidence of criminal culpability to err on the side of caution and claim that privilege, since

"a §7203 conviction cannot be based on a valid exercise of the privilege." The case at bar provides an example of: 1) a valid claim of privilege, 2) a §7203 conviction notwithstanding a valid claim based on the trial court's determination that the claim was not valid and a jury finding of guilt based on the defendant's "willful" invocation of the privilege, and 3) a situation that will confront many members of the public who require a resolution of this issue to clarify the law relating to claims of privilege on the form 1040 where the information withheld would be incriminating.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Fifth Amendment to the Constitution of the United States Constitution provides in pertinent part:

> "No person shall ... be compelled in any criminal case to be a witness against himself ..."

II. Title 18 U.S.C. §1001, which provides that:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

III. Title 26 U.S.C.§7203, which provides that:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof

to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

IV. Title 26 U.S.C.§7205, which provides that:

"Any individual required to supply information to his employer under section 3402(f) who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu

of any penalty otherwise provided, upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both."

V. Title 26 U.S.C.§7206(1), which provides that:

"Any person who -

(1) Declaration under penalties of perjury. - Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or ... shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

On May 3, 1978, Philip R. Jacka, a welder and pipefitter from northern Wyoming, was charged by Information with three counts of willful failure to file income tax returns for calendar years 1974, 1975, and 1976, in violation of 26 U.S.C.§7203.

It was undisputed at trial that Defendant:

1) Had mailed 1040 forms (U.S. Individual Income Tax Returns) to the Internal Revenue Service in Ogden, Utah, for the three years in question, disclosing thereon his name and address,

2) Had claimed his Fifth Amendment right to remain silent by inserting the word "object" in the spaces provided on the 1040 form for dollar amounts to be expressed munerically, and

3) Had attached to each 1040 form filed approximately fifty pages of exhibits and argument invoking his Fifth Amendment right to be free from compelled self-incrimination, citing newspaper articles, essays, statutes, and case law supporting the legality of his position.

Jacka's defense was that his Fifth Amendment claim was proper because he had submitted withholding exemption certificates (W-4E's) to his employer during 1974, 1975, and 1976, on which he subscribed his signature to the following statement: "Under penalties of perjury, I certify that I incurred no liability for Federal income tax for (the previous year) and that I anticipage that I will incur no liability for Federal income tax for (the current year)." The Government prosecuted on the theory that an income tax return on which the

Defendant failed "to provide sufficient information from which to compute a tax liability" was tantamount to failure to file anything at all and that this Defendant's invocation of the Fifth Amendment on his 1040's was "not in good faith", i.e., "willful", since there was no real possibility of self-incrimination presented by disclosing "sufficient information from which to compute a tax liability".

Prior to the instant case, by an Indictment filed October 15,1976, this Defendant had been charged with three counts of willfully filing false withholding exemption certificates (the same W-4E certificates described in the previous paragraph). A jury trial was held in United States District Court for the District of Wyoming before the Honorable Clarence Brimmer. Judgment of acquittal was entered on the

jury verdict of not guilty as to all three counts December 22, 1976.

The instant case was tried to a jury after Defendant's motions for judgment of acquittal were denied by the Honorable Clarence Brimmer, who had presided at the previous trial, and a verdict of guilty was returned August 15, 1978. Judgment of conviction was entered on the verdict September 27, 1978, and Defendant was sentenced to six months imprisonment on Count I, fined $2,000 on Count II, and placed on probation for five years, whence he appealed to the United States Court of Appeals for the Tenth Circuit.

In affirming the District Court, the Tenth Circuit held:

> "When the intent is to defy the income tax laws by filing no return at all, as occurred in this case, the

defendant can be convicted of willfully failing to file returns. There was no valid, good faith exercise of the Fifth Amendment privilege against self-incrimination in these circumstances. Therefore, a Fifth Amendment claim fails to operate so as to prevent a determination of willfulness ... where, as here, a defendant has failed to file any return at all (by failing to provide information from which the tax liability can be computed), the law will not recognize a defense to a §7203 violation the assertion of privilege under the Fifth Amendment."

The opinion was filed May 31, 1979, and by order July 12, 1979, pending submission of a petition for writ of certiorari no later than July 30, 1979,and action thereon, the mandate has been stayed.

PORTIONS OF THE TRIAL

At the trial of this case the Defendant chose not to testify, continuing in his insistence on his constitutional privilege. Three agents of the Internal Revenue Service testified and were cross-examined regarding the possibilities of self-incrimination which would have eventuated from the W-4E's which the Defendant submitted to his employers, if he had made the disclosures requested on the income tax returns in question. It was ultimately conceded by the three IRS agent/witnesses - nor was any other evidence adduced at trial to the contrary - that had the Defendant provided "sufficient information from which to compute a tax liability" he could and/or would have incriminated himself with respect to perjury charges for "certify(ing) under penalties of perjury that [he] incurred no liability for Federal

income tax" for the years in question. Title 26 U.S.C.§7206 provides that:

> "Any person who -
> (1) Declaration under penalties of perjury. - Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or ... shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

Special Agent Lyle J. Bjorn of the IRS, who was in charge of the investigations which culminated in criminal prosecutions against the Defendant in 1976 (hereinbefore described) and in this case, had informed the Defendant in 1975 that the IRS was concerned with both W-4E filings and failures to file forms 1040

which contained "sufficient information from which to compute a tax liability". (Record on Appeal, Transcript Vol. II, p. 106, lines 7 through 15, and p.111, lines 8 through 21). Agent Spangler of the IRS testified that the information withheld by the Defendant would have incriminated him as to the W-4E's he had filed. (Record on Appeal, Transcript Vol. II, p. 36, line 24,through p. 37, line 17). Special Agent Bjorn admitted that if the Defendant had provided the information in lieu of claiming the privilege, he would have incriminated himself as to perjury charges. (Record on Appeal, Transcript Vol. II, p.106, lines 7 through 15; p. 111, lines 8 through 21; pp. 116, 222, and 224). In addition to 26 U.S.C.§7206, such perjury charges could be brought by virtue of Title 18 U.S.C.§1001:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

ARGUMENT FOR GRANTING THE WRIT AND QUESTIONS ON REVIEW

The Writ should be granted because the findings of the Court of Appeals that,

> "The defendant's claim that he refused to disclose his tax liability on form 1040 only because of fear that the information would be used against him in a prosecution for filing false W-4E's appears to be an afterthought. Nothing in the record suggest that

> the defendant's actions, in filing the 1040's as he did, were motivated by a specific fear of prosecution for filing false W-4E's.
>
> A further weakness of the defense is shown from the fact that most of the 1040's involved in this prosecution were filed <u>after</u> the defendant was acquitted of filing false W-4E's. This is an attempt at rationalizing. But it is weak in view of the fact that there had been an acquittal on most of these. It is impossible to believe that a fear of further prosecution existed."

are impossible to believe, since, according to the Court's <u>ratio decidendi</u>, the protection of the Fifth Amendment privilege would be subjected to a judicial assessment of the claimant's state of mind upon invocation of the privilege, notwithstanding the admission of the Government's witnesses that the information withheld could and would incriminate

the claimant. The finding by the Court of Appeals that "It is impossible to believe that a fear of further prosecution existed," is itself transparently disingenuous in light of the undisputed evidence elicited from the three agents of the Internal Revenue Service that the information withheld was, in fact, incriminating as to 1) various W-4E's filed by the Defendant for which he has not been tried (26 U.S.C.§7205) and 2) perjury charges which could be brought against this Defendant (18 U.S.C.§1001 and 26 U.S.C.§7206(1)).

At page 2 of the opinion the Court of Appeals sets forth the Defendant's position precisely:

> "It was claimed on behalf of the defendant at the trial that conviction was barred because the defendant had not acted willfully; that his failure to provide information regarding his

tax liability was a valid and good faith exercise of the defendant's Fifth Amendment privilege against self-incrimination. The defense also claimed that since the defendant had filed withholding exemption certificates (form W-4E's), which indicated under penalties of perjury that the defendant had incurred no income tax liability for the previous year and expected no income tax liability for the current year, the defendant could not be compelled to disclose on form 1040 that he really had incurred tax liability."

Restated, the Defendant's position is this: having made a declaration under penalties of perjury, one cannot be compelled to admit that such declaration was perjured. This is not a jury question. A jury question arises only when the claim of privilege is erroneous, i.e. the information withheld clearly lacks inculpatory potential. Only after a correct conclusion that disclosure

could not possibly incriminate, is the erroneous claimant of the privilege left with the defense that, even though erroneous, the claim was made in good faith, i.e. the claimant believed that the information could incriminate when, in fact, it could not.

The Court of Appeals confusion of a valid claim of the privilege with an erroneous but good faith claim is revealed at page 3 of its opinion:

> "The defendant's approach on appeal ignores the jury's consideration and rejection of a defense based on a valid, good faith exercise of the Fifth Amendment privilege against self-incrimination. The jury was instructed on the element of willfulness and the Fifth Amendment defense at length. Obviously, from the verdict, the jury rejected the Fifth Amendment defense. [emphasis added]"

A valid claim of the privilege, i.e. a refusal to provide incriminating information,

precludes submission of the case to the jury. The trial judge initially determined that the claim of privilege was not valid, a prerequisite to any finding of willfulness. To hold otherwise would create an additional requirement for a valid Fifth Amendment claim: "nor shall any person be compelled to be a witness against himself in any criminal case, unless his refusal to do so is 'willful'." According to the jurors' statements to counsel for the defendant after the trial, the guilty verdict was based upon the jury's conclusion that "everybody knows you have to fill out your 1040 form". The following findings of the Court of Appeals indicate a similar basis for affirming the conviction:

> "An examination of the 1040's for the three years shows that the defendant claimed that virtually all the information requested on the forms

was protected by the Fifth Amendment. The defendant also asserted many other grounds, besides the Fifth Amendment, as a basis for refusing to disclose information ... The appearance of the 1040's does not suggest that this defendant was objecting to a specific disclosure, tax liability, because the information would be used in prosecutions for filing false W-4E's.

The defendant's real motivation is clearer as a result of his statements to an Internal Revenue Service agent that he (the defendant) 'didn't believe in paying taxes' and that 'taxes were unconstitutional'. The agent testified to these statements at trial."

But all of this ignores two facts: 1) that the Defendant was charged with willfully failing to provide sufficient information from which to compute a tax liability and 2) that, had he done so, the disclosures would have incriminated him as to 18 U.S.C.

§1001, 26 U.S.C.§7205, and 26 U.S.C.§7206(1). It makes no difference that the Defendant erroneously claimed the privilege as to other disclosures which would not have been inculpatory. It is immaterial that the Defendant asserted additional constitutional objections to disclosure, so long as he made a Fifth Amendment claim as to the information that would incriminate. It is of no consequence that the Defendant's 1040's do not suggest that he was specifically objecting to disclosure of tax liability or that he feared prosecution under a specific statute. The facts are: 1) he objected to disclosing his tax liability or any data from which it might be ascertained and 2) his failure to provide that information constitutes the gravamen of the offense of which he stands convicted.

The Court of Appeals reveals an obsession with "the Defendant's real motivation", but the Defendant cannot be guilty of the crime charged, i.e. his refusal to incriminate himself, no matter how diabolical his desiderata, cannot be criminalized without thereby abrogating the Fifth Amendment's prohibition. The hearsay statements attributed to the Defendant by "the agent [who] testified to these statements at trial" are deemed significant by the Court because "the defendant's real motivation is clearer as a result;" but the real motivation of the Defendant is irrelevant when the information he withholds would incriminate him. The same "agent [who] testified to these statements [of Defendant] at trial" also admitted unequivocally that had the Defendant "provided sufficient information from which to compute his tax liability" he would thereby

have incriminated himself 1) because of the several W-4E's he had filed in addition to the W-4E's as to which he was acquitted and 2) by making mutually exclusive statements under penalties of perjury as to tax liability had he inscribed the information sought on the 1040 form.

At page 2 and in footnote 1 on page 3 of its opinion, the Court of Appeals notes:

> "This defendant had been charged with filing false withholding tax exemption certificates, but this ended in acquittal in December of 1976[1].

1. The defendant was acquitted on three counts which included the years 1974 and 1975. It is not clear from this record what year the third count involved.

This record also does not provide any clue concerning why the defendant was acquitted. The defense argued that the defendant could refuse to disclose information on form 1040 concerning

his tax liability because that information could be used against him in a prosecution for filing false W-4E's. The defense argument at least suggests that some false W-4E's may have been filed.

From August 19, 1974, through April 18, 1977, Defendant Philip Jacka filed eight (8) W-4E's - at least one in each calendar year - with five firms which employed him during that period. The Defendant offered to stipulate, which offer was declined, to the receipt of gross income in the calendar years shows as follows:

1974 - $24,019.44;

1975 - $16,903.69;

1976 - $21,528.21.

The third count of the case tried in December, 1976, concerned a W-4E filed April 6, 1976, and the case agent so testified at trial, hence all parties were aware that W-4E's

had been filed by this Defendant as to all three taxable years for which he was tried in the instant case on the basis that he had refused to "provide sufficient information from which to compute a tax liability." The Court of Appeals correctly concludes its footnote with the assertion that "the defense argument at least suggests that some false W-4E's may have been filed," but ignores the testimony (of the agent who related hearsay statements of the Defendant) that those W-4E's were false. Nothing could be more apparent than the belief of the Internal Revenue Service that the W-4E's were perjurious since the prosecution for willful failure to file in this case was predicated on that conclusion.

In the section of its opinion entitled Issues on Appeal, the Tenth Circuit phrases the issue thusly:

> "The defendant here argues that the trial court improperly denied the motion for judgment of acquittal. He asked this court to grant the motion and enter a judgment of acquittal. The apparent theory of defendant is that willfulness is lacking as a matter of law once defense counsel asserts that defendant was carrying out a valid, good faith exercise of Fifth Amendment rights."

Subsequently, at page 6 of the opinion, the Court observes:

> "The determination of willfulness is a question of fact for the trier of fact.[4]"

And footnote 4 provides: Willfulness is determined by a court, as a matter of law, only when the element of willfulness is clearly lacking.

Just so, contends the defense. When the information withheld has been shown to be inculpatory, non-disclosure thereof can

never be willful. If the law were otherwise the privilege would not protect citizens from compelled self-incrimination unless they demonstrated that their refusal to waive the privilege - notwithstanding the incriminating nature of the evidence sought - was "in good faith". The actual as opposed to "apparent" theory of Defendant is that willfulness is lacking as a matter of law when the unrebutted testimony at trial establishes a substantial probability of incrimination attendant upon disclosure of the putatively privileged evidence. Thereafter, when the prosecution rested its case against Defendant for willful failure to provide the information, it was error for the trial court to deny the motion for judgment of acquittal and the decision of the Tenth Circuit has perpetuated that error.

"The Fifth Amendment defense to willful failure to file a return, when the return provides no information for determining tax liability, is based on a misinterpretation of the Supreme Court decisions in Garner v. United States, 424 U.S.648 (1976), and United States v. Sullivan, 274 U.S.259 (1927)," according to the opinion of the Tenth Circuit at pp. 6-7, which goes on to state that "The Supreme Court has stated that the privilege against self-incrimination may be used in a return to prevent a specific disclosure (like an illegal occupation), where the information could be used as the basis for prosecution for a nontax defense ... The Fifth Amendment does not stretch so as to permit a taxpayer to avoid disclosure of information from which a tax liability for the year can be computed." If this were a correct statement of the law, the Fifth

Amendment would itself require amendment to exclude from its privilege compelled disclosures of income tax liability which incriminated individuals. Title 18 U.S.C. Section 1001 is a "nontax offense": the reasoning of the Court of Appeals yields a conclusion contrary to its own holding when it concedes "that the privilege against self-incrimination may be used in a return to prevent a specific disclosure, where the information could be used as the basis for prosecution for a nontax offense."

It is not, as the Court of Appeals would have it, a question of stretching the Fifth Amendment "so as to permit a taxpayer to avoid disclosure of information from which his tax liability for the year can be determined;" rather, the Fifth Amendment does not shrink so as to require a taxpayer to disclose information from which

the tax liability for the year can be determined where such information would incriminate the taxpayer - and it makes no difference whether the offense is "nontax" or otherwise.

The statements on page 8 of the opinion regarding the "non-accusatorial setting" of the form 1040 flies in the face of the Garner decision, supra, which requires a claim of privilege on the 1040 instead of disclosure. It is simply syllepsis to assert that "where, as here, a defendant has failed to file any return at all ... the law will not recognize as a defense to a §7203 violation the assertion of privilege under the Fifth Amendment."

As the Supreme Court held in Garner, supra, 47 L.Ed. 2d 370, at p. 382, 384:

> "As long as a valid and timely claim of privilege is available as a defense to a taxpayer prosecuted for failure to make a return, the taxpayer has not been denied a free choice to remain silent merely because of the absence of a preliminary judicial ruling on his claim ... A §7203 conviction cannot be based on a valid exercise of the privilege."

Since it was undisputed that the information withheld constituted a real and appreciable threat of self-incrimination, the Defendant was not properly convicted and his conviction should be reversed. The Fifth Amendment conundrum created by §§7203, 7205, 7206(1) and 18 U.S.C.§1001 is analogous to the problem which the Supreme Court confronted in Haynes v. United States, 390 U.S. 85, 19 L.Ed. 2d 923, 88 S.Ct. 722 (1968), a case concerning "whether enforcement of §5851 (of Title 26,

U.S.C.) against petitioner, despite his assertion of the privilege against self-incrimination, is constitutionally permissible ... and if a prosecution under §5841 would have punished petitioner for his failure to incriminate himself, it would follow that a proper claim of privilege should have provided a full defense to this prosecution." Haynes, supra, at p.90. The distinction between Haynes and the case at bar inheres in the facial invalidity of the two statutes in Haynes, i.e. possession of certain firearms was prohibited by §5851 and failure to report that crime was itself a criminal offense under §5841, whereas in the instant case the statutes are not facially invalid, but, nevertheless, infringe on this Defendant's Fifth Amendment privilege because §§7205 and 7206(1) and 18 U.S.C. §1001 prohibit certain conduct

and failure to provide information which could incriminate this Defendant under §§7205 and 7206(1) and 18 U.S.C.§1001 comprised the offenses charged under §7203. In both Haynes, supra, and this case, the synergistic effect of two reporting statutes infringes upon Defendant's Fifth Amendment rights.

CONCLUSION

Because Title 18 U.S.C.§1001 and Title 26 U.S.C.§§7203, 7205, and 7206(1), compelled this Defendant to choose between the Scylla of self-incrimination or the Charybdis of prosecution for willful failure to file and he suffered criminal conviction for pursuing the latter course and persevering with the privilege, his Fifth Amendment right to be free from compelled self-incrimination has been violated. The duty

devolves upon this Court to extricate this Defendant, and the many others faced with the same dilemma, from the maelstrom into which he has been plunged by conviction and vindicate his constitutional right. The fear that the Court would thereby create a loophole by which wage earners could avoid disclosing "sufficient information from which to compute a tax liability" through the simple expedient of filing a false or fraudulent W-4E fails to appreciate the sanctions provided by 18 U.S.C.§1001 and 26 U.S.C.§§7205 and 7206(1).

It is respectfully submitted that the District Court's refusal to grant Defendant's Motion for Judgment of Acquittal at the close of the prosecution's case or thereafter and the affirmance thereof constitute reversible error, requiring reversal of the conviction and entry of a judgment of acquittal

in its stead.

For the reasoning set out above the Supreme Court should grant a Writ of Certiorari and render justice in this case.

Respectfully submitted,

Charles H. Foster

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Attorneys for
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July, 1979

AFFIDAVIT OF SERVICE

COUNTY OF DENVER)
) ss.
STATE OF COLORADO)

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari by depositing the same in the U.S. Mail, Denver, Colorado, with sufficient airmail postage prepaid affixed thereto, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

this 30th day of July, 1979.

William A. Cohan

The undersigned personally appeared before me this 30th day of July, 1979, and swore to the veracity of the foregoing affidavit.

Notary Public

My Commission Expires:

APPENDIX A

F I L E D
United States Court of Appeals
Tenth Circuit
May 31, 1979
Howard K. Phillips
Clerk

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1906

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PHILIP R. JACKA, Defendant-Appellant.	))))))	Appeal from the United States District Court for the District of Wyoming (D.C. No. CR 78-055)

Submitted on the briefs (Calendar C).

Charles E. Graves, United States Attorney, and Sharon A. Lyman, Assistant United States Attorney, for Plaintiff-Appellee.

William A. Cohan, Denver, Colorado, for Defendant-Appellant.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

INTRODUCTION

The defendant-appellant, Philip Jacka, was convicted of willfully failing to file federal income tax returns for 1974, 1975, and 1976. A jury convicted the defendant of violating §7203 of the Internal Revenue Code. The defendant submitted form 1040's for the three years in question, but these forms were devoid of information from which the defendant's tax liability could have been determined. The defendant's objections to the disclosure of the requested information were all inclusive. His reasons included asserted rights under the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Thirteenth, Fourteenth and Sixteenth Amendments to the Constitution; rights under the state constitution; protection of religious beliefs; the complexities of the tax laws; and the vagueness of the symbol "$."

It was established at trial that the defendant's gross income in each of the three years exceeded the statutory minimums and so required returns to be filed.

It was claimed on behalf of the defendant at the trial that conviction was barred because the defendant had not acted willfully;

that his failure to provide information regarding his tax liability was a valid and good faith exercise of the defendant's Fifth Amendment privilege against self-incrimination. The defense also claimed that since the defendant had filed withholding exemption certificates (form W-4E's), which indicated under penalties of perjury that the defendant had incurred no income tax liability for the previous year and expected no income tax liability for the current year, the defendant could not be compelled to disclose on form 1040 that he really had incurred tax liability.

This defendant had been charged with filing false withholding tax exemption certificates, but this ended in acquittal in December of 1976.[1] Subsequent to this the government presented the present case charing willful failure to file a return.

Both before and after the jury's verdict of guilty, defense counsel moved for a judgment of acquittal. The trial judge (Judge Brimmer) denied both motions.

ISSUES ON APPEAL

The defendant here argues that the trial court improperly denied the motion for judgment of acquittal. He asked this court

to grant the motion and enter a judgment of acquittal. The apparent theory of defendant is that willfulness is lacking as a matter of law once defense counsel asserts that defendant was carrying out a valid, good faith exercise of Fifth Amendment rights.

DISCUSSION OF THE EVIDENCE AND APPLICABLE LAW

The defendant's approach on appeal ignores the jury's consideration and rejection of a defense based on a valid, good faith exercise of the Fifth Amendment privilege against self-incrimination. The jury was instructed on the element of willfulness and the Fifth Amendment defense at length.[2] Obviously, from the verdict, the jury rejected the Fifth Amendment defense.

The jury was allowed to determine factually whether the Fifth Amendment defense was viable in the course of reaching its verdict. Our review of that factual determination is limited to ascertainment of the presence of substantial evidence to support the jury's verdict. United States v. Parnell, 581 F.2d 1374, 1381 (10th Cir. 1978). From a review of the record in this case, we conclude that there was substantial evidence

presented to support the verdict, including the element of a willful failure to file income tax returns.

The defendant's claim that he refused to disclose his tax liability on form 1040 only because of fear that the information would be used against him in a prosecution for filing false W-4E's appears to be an afterthought. Nothing in the record suggests that the defendant's actions, in filing the 1040's as he did, were motivated by a specific fear of prosecution for filing false W-4E's.

A further weakness of the defense is shown from the fact that most of the 1040's involved in this prosecution were filed after the defendant was acquitted of filing false W-4E's.[3] This is an attempt at rationalizing. But it is weak in view of the fact that there had been an acquittal on most of these. It is impossible to believe that a fear of further prosecution existed.

An examination of the 1040's for the three years shows that the defendant claimed that virtually all the information requested on the forms was protected by the Fifth Amendment. The defendant also asserted

many other grounds, besides the Fifth Amendment, as a basis for refusing to disclose information. The defendant did request refunds for two of the years although the defendant provided no information on the forms from which his tax liability for any of the years could be computed. The defendant refused to sign some of the returns. The appearance of the 1040's does not suggest that this defendant was objecting to a specific disclosure, tax liability, because the information would be used in prosecutions for filing false W-4E's.

The defendant's real motivation is clearer as a result of his statements to an Internal Revenue Service agent that he (the defendant) "didn't believe in paying taxes" and that "taxes were unconstitutional." The agent testified to these statements at trial.

There was substantial evidence in the record to support the jury's determination that the defendant acted willfully when he failed to file the returns. The determination of willfulness is a question of fact for the trier of fact.[4] The facts fail to support the defendant's theory of the case

that there was a valid, good faith exercise of rights under the Fifth Amendment. The jury's verdict cannot be overturned for insufficient evidence.

When a defendant refuses to provide any information in a return from which his tax liability can be determined, a defense that the information was withheld based on a valid, good faith exercise of the Fifth Amendment privilege against self-incrimination is usually rejected as a matter of law. Trial judges have properly refused to submit the Fifth Amendment defense to juries because such a defense is not recognized by the law. See, e.g., United States v. Brown, No. 77-1761 (10th Cir. April 12, 1979); United States v. Irwin, 561 F.2d 198, 201 (10th Cir. 1977).

The Fifth Amendment defense to willful failure to file a return, when the return provides no information for determining tax liability, is based on a misinterpretation of the Supreme Court decisions in Garner v. United States, 424 U.S. 648 (1976), and United States v. Sullivan, 274 U.S. 259 (1927). This was considered in this court's

recent decision in United States v. Brown, No. 77-1761 (10th Cir. April 12, 1979).

The Supreme Court has stated that the privilege against self-incrimination may be used in a return to prevent a specific disclosure (like an illegal occupation), where the information could be used as the basis for prosecution for a nontax offense. Garner v. United States, 424 U.S. 648 (1976).[5] However, the Supreme Court has clearly indicated that the Fifth Amendment privilege cannot be used to refuse to make any return at all. Garner v. United States, 424 U.S. 648, 651 n.3 (1976); United States v. Sullivan, 274 U.S. 259, 263 (1927) (defendant never filed a return). This court has adopted the position that a form 1040, which contains no information from which the tax liability can be determined, is tantamount to no return at all. United States v. Brown, No. 77-1761, at 3 (10th Cir. April 12, 1979); United States v. Irwin, 561 F.2d 198, 201 (10th Cir. 1977). The Fifth Amendment does not stretch so as to permit a taxpayer to avoid disclosure of information from which the tax liability for the year can be determined. United States v. Brown, No. 77-1761, at 5 (10th Cir.

April 12, 1979); United States v. Irwin, 561 F.2d 198, 201 (10th Cir. 1977).

The Fifth Amendment protects a person from being "compelled in any criminal case to be a witness against himself." Because the information sought by the income tax return is requested in a non-accusatorial setting, the requirement to file such a return and to report sufficient information to determine the year's tax liability does not violate the Fifth Amendment. United States v. Irwin, 561 F.2d 198, 201 (10th Cir. 1977); Pauldino v. United States, 500 F.2d 1369, 1370-71 (10th Cir. 1974). The United States government has the right to gather information for the collection of revenue. Pauldino v. United States, 500 F.2d 1369, 1370-71 (10th Cir.1974).

When the intent is to defy the income tax laws by filing no return at all, as occurred in this case, the defendant can be convicted of willfully failing to file returns. There was no valid, good faith exercise of the Fifth Amendment privilege against self-incrimination in these circumstances. Therefore, a Fifth Amendment claim fails to operate so as to prevent a determination of

willfulness.

The trial judge submitted the Fifth Amendment question to the jury, notwithstanding that the question could have been ruled out as a matter of law. The instructions did describe the limitations of a Fifth Amendment defense in a willful failure to file case. The instructions allowed the jury to consider all possible defenses bearing on the willfulness element.

IN SUMMARY

The defendant's conviction must be affirmed. Neither the facts nor the law support the defendant's arguments. The jury considered the facts and rejected the Fifth Amendment defense. There is substantial evidence to support the jury's verdict of guilty. Where, as here, a defendant has failed to file any return at all (by failing to provide any information from which the tax liability can be computed), the law will not recognize as a defense to a §7203 violation the assertion of privilege under the Fifth Amendment.

The judgment is affirmed.

1. The defendant was acquitted on three counts, which included the years 1974 and 1975. It is not clear from this record what year the third count involved.

This record also does not provide any clue concerning why the defendant was acquitted. The defense argued that the defendant could refuse to disclose information on form 1040 concerning his tax liability because that information could be used against his in a prosecution for filing false W-4E's. The defense argument at least suggests that some false W-4E's may have been filed.

2. The instructions included the following:

This Fifth Amendment privilege against compulsory self-incrimination guarantees each citizen the right to refuse to incriminate himself. This does not,however, excuse a person from filing any income tax return at all, since the information is requested in the non-accusatorial setting.

The Fifth Amendment protection from self-incrimination normally does not apply to the amount of earnings of computative data to be reported on the return, nor does it apply to other innocuous or harmless questions.

Thus, a person is not entitled to a blanket Fifth Amendment objection to all of the information sought in the income tax return. A taxpayer, in [J]ustice, (sic) Oliver Wendell Holme's (sic) famous words, cannot draw a conjurer's circle around the entire return by his own declaration that to

write any word upon it would bring him into danger of the law.

A valid ascertation (sic) of the privilege must be directed to specific questions contained in the return, and must be based on a real possibility that answering the questions will subject the taxpayer to criminal prosecution.

You are instructed that a valid and timely claim of the Fifth Amendment privilege or a claim of privilege made in good faith, but erroneously may negate the element of willfulness, that being the third element of each of the offenses contained in the information.

It, therefore, is the duty of the jury to determine whether or not the reason for the defendant's claim of the Fifth Amendment was based on a good faith mistake or on a real possibility of criminal prosecution or whether the Defendant's refusal to supply information on grounds of claim of privilege was willful, that is, was motivated by some sbad purpose such as a desire to impede, harrass (sic), delay, or evade the payment of taxes.

[3]. The defendant filed an original 1974 return before the acquittal, but the amended 1974 return, the 1975 return, and the 1976 return were not filed until August 18, 1977. The defendant was acquitted of the three counts of filing false W-4E's in December of 1976.

[4]. Willfulness is determined by a court, as a matter of law, only when the elements of willfulness is clearly lacking.

[5]. Since Garner disclosed in his return that he was a gambler instead of asserting the Fifth Amendment privilege in the return, that information could be used as evidence against the defendant in a prosecution for illegal gambling. Garner v. United States, 424 U.S. 648 (1976).

APPENDIX B

MAY TERM - JULY 12, 1979

Before The Honorable Robert H. McWilliams, Circuit Judge, the Honorable James E. Barrett, Circuit Judge, and The Honorable William E. Doyle, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

vs.

PHILIP R. JACKA,

Defendant - Appellant.

No. 78-1906

This matter comes on for consideration of appellant's motion for stay of mandate in the captioned cause pending timely application to the Supreme Court for certiorari.

Upon consideration whereof, the motion for stay of mandate is granted. The mandate shall be stayed until August 11, 1979, pending certiorari, and that if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

APPENDIX B (continued)

Howard K. Phillips, Clerk

By: (s) Howard K. Phillips

A true copy

Teste

[S E A L]

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

by

(s) Vicki Edmisson
Deputy Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-1116

PHILIP R. JACKA,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 30, 1979.

/s/ Byron S. White
Associate Justice of the Supreme Court of the United States

Dated this 25th day of June, 1979.

APPENDIX D

TITLE 26-PROCEDURE AND ADMINISTRATION

7203. Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(Aug. 16, 1954, c. 736, 78A Stat. 851).

APPENDIX E

TITLE 26-PROCEDURE AND ADMINISTRATION

7205. Fraudulent Witholding Exemption Certificate or Failure to Supply Information.

Any individual required to supply information to his employer under section 3402(f) who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any penalty otherwise provided, upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both.

(Aug. 16, 1954, c.736, 68A Stat. 852)

APPENDIX F

TITLE 26-PROCEDURE AND ADMINISTRATION

7206. Fraud and False Statements.

Any person who -

(1) Declaration under penalties of perjury. - Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

...

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosectuion.

(Aug. 16,1954,c.736, 68A Stat.852)

APPENDIX G

TITLE 18-CRIMES

1001. Statements or Entries Generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfuly falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes or uses any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch 645, §1, 62 Stat.749).

No. 79-177

In the Supreme Court of the United States

OCTOBER TERM, 1979

PHILIP R. JACKA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
Attorney
Department of Justice
Washington, D.C. 20530

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1979

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PHILIP R. JACKA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. i-xiii) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1979. By order dated June 25, 1979, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including July 30, 1979 (Pet. App. xvi). The petition for a writ of certiorari was filed on August 1, 1979.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The petition was therefore filed two days beyond the time limit provided by Rule 22(2) of the Rules of this Court.

QUESTION PRESENTED

Whether petitioner's conviction for willful failure to file tax returns was barred by the Fifth Amendment privilege against compulsory self-incrimination.

STATEMENT

Following a jury trial in the United States District Court for the District of Wyoming, petitioner was convicted on three counts of willful failure to file income tax returns for 1974-1976, in violation of 26 U.S.C. 7203 (Pet. App. ii; R. 68).[2] The trial court sentenced him to six months' imprisonment on the first count, imposed a $2,000 fine on the second count, and sentenced petitioner to five years' supervised probation on the third count, to commence after completion of the prison term (R. 72, 73, 103).

The evidence at trial established that petitioner's tax returns were due to be filed on or before April 15 of the year following the taxable years at issue and that petitioner was required to file a return for each year if he received gross income of $2,800 in 1974, $3,400 in 1975, and $3,600 in 1976 (Tr. 28-30, 37, 38-39, 174-175). The evidence further established that petitioner, who is a pipefitter, had gross income from wages of $24,019.44 in 1974, $16,767.13 in 1975, and $21,528.21 in 1976 (Tr. 47, 49, 59-60, 63-64, 66-68, 70-71, 75, 78, 88, 92, 95, 174-175).

Sometime prior to April 15, 1975, petitioner filed a document which purported to be his tax return for 1974 (Tr. 19-20, 38; Govt. Ex. 3). That document, which was a Form 1040 for 1974, was dated March 19, 1975. It listed petitioner's name and that of his wife, was signed by

[2]"R." refers to the record on appeal. "Tr." refers to the trial transcript.

petitioner and his wife, listed their address, their social security numbers, interest income received, federal income tax withheld, and other payments received, and claimed a refund of $3,801 (Govt. Ex. 3). Petitioner inserted the words "Object—Self-incrimination" in the blanks on the Form 1040 calling for his occupation, wages received, the computation of tax and the taxes due. He wrote the word "None" in all other blanks. Petitioner attached to the Form 1040 various materials, including, *inter alia*, two pages containing short synopses of various cases involving Fifth Amendment questions, copies of several newspaper articles, and a copy of a document entitled "Tax Protestor Declaration of Independence" (*ibid.*).

Following the filing of this document, Special Agent Lyle Bjorn was assigned to determine whether petitioner had sufficient income to require him to file a tax return for 1974 (Tr. 100). On August 21, 1975, Agent Bjorn wrote petitioner, advising him, *inter alia*, that the Form 1040 that he filed for 1974 was not acceptable as a tax return and that Bjorn was investigating possible criminal violations by petitioner for willful failure to file a tax return and for furnishing false withholding information to one of his employers (Tr. 102-103, 105-106; Govt. Ex. 21-A).[3] Subsequently, petitioner told the agent that he was not going to correct the Form 1040 he had filed and that his reason for submitting the type of return he filed was that he did not "believe in paying taxes on taxes" and because "he felt that taxes were unconstitutional" (Tr. 107-109).

[3]The Internal Revenue Service had previously sent petitioner a similar letter on April 22, 1975 (Tr. 101-105; Govt. Ex. 21).

Thereafter, petitioner did not file any tax returns until August, 1977 (Tr. 37-40). At that time, petitioner filed a purported amended tax return for 1974, a purported amended tax return for 1975 (despite the fact that he had never filed an original return for that year), and a purported tax return for 1976 (Tr. 24-25, 37-40; Govt. Exs. 4-6). These documents, which were Forms 1040 for the particular years, were essentially identical in all respects. Each form contained petitioner's name and address, but none of them were signed or dated. The word "Object" was written in almost every blank on the forms. Attached to each Form 1040 was a multi-page printed form, upon which petitioner's name was written in the appropriate blanks. These printed forms advised the Internal Revenue Service that petitioner, in refusing to file completed tax returns, was relying upon his rights under the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Fourteenth and Sixteenth Amendments; all other rights listed in the Constitution; the fact that there was no lawful money in circulation; and his belief that tax revenues were being put to improper uses. A part of each multi-page printed form was a printed affidavit, which petitioner signed and dated; this affidavit advised the Internal Revenue Service that petitioner believed the filing of a completed tax return could incriminate him because, *inter alia*, the Service could find something wrong with any return and because he believed that he might be prosecuted for perjury if he filled out his tax returns according to his understanding of the term "dollar" (*ibid.*).

On the first day of trial, petitioner moved to dismiss the information. He asserted that he was entitled to claim the Fifth Amendment privilege on his tax returns and refuse to supply any information from which tax liability could be computed because the government could have used

such information against him in an earlier prosecution for filing false withholding exemption certificates (Forms W-4E), which related to some of the years in issue in this case (Tr. 7-10).[4] The court denied the motion (Tr. 12). At the conclusion of the government's case, petitioner urged the same grounds in seeking a judgment of acquittal (Tr. 214-215) The court also denied this motion (Tr. 218), and a subsequent similar motion to set aside the jury verdict (R. 69-71).

The court of appeals affirmed. It held that there was sufficient evidence in the record to support the jury's determination that petitioner acted willfully in failing to file tax returns (*i.e.*, that petitioner was not invoking his Fifth Amendment rights in good faith), and, at all events,

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[4]A withholding exemption certificate (Form W-4E) is used to terminate the withholding of all income taxes by an employer. The form, which must be signed under penalty of perjury, recites that the employee incurred no tax liability in the previous year and anticipates no tax liability for the current year.

Petitioner contended that he had been tried and acquitted on December 26, 1976, on three counts charging him with filing false withholding exemption certificates (Tr. 7-8, 11). Special Agent Bjorn testified on cross-examination that those charges related to 1974 and 1975 (Tr. 116). Bjorn also testified on cross-examination that petitioner had continued to file withholding exemption certificates "covering" 1976 (*ibid.*). Agent Bjorn admitted on cross-examination that information supplied by a taxpayer in a tax return could be used against him in a prosecution for filing a false withholding exemption certificate (Tr. 116, 118, 152). Chester Spangler, another Internal Revenue Service employee, made the same point (Tr. 36-37).

Petitioner correctly asserts (Pet. 27) that he filed eight withholding exemption certificates with his employers from August 19, 1974, through April 18, 1977. Petitioner was tried and acquitted on charges that he filed false withholding exemption certificates on June 23, 1975; July 24, 1975; and April 6, 1976. He also filed withholding exemption certificates with his employers on August 19, 1974; December 17, 1975; January 21, 1976; February 2, 1976; and April 18, 1977.

that the fifth Amendment privilege does not permit a taxpayer to avoid disclosure of information on a tax return from which the tax liability for the year can be determined (Pet. App. i-xiii).

ARGUMENT

1. Petitioner argues (Pet. 17-20) that there was a possibility that information on his tax returns from which tax liability could have been computed might have been used to prosecute him for filing false withholding exemption certificates. He therefore concludes that he was entitled to invoke his Fifth Amendment privilege and refuse to supply such information on his tax returns, and that his convictions should be set aside.

But petitioner's argument is irrelevant with respect to the convictions for 1975 and 1976. Moreover, the evidence adduced at trial refutes petitioner's claim for 1974. Section 7203 of the Internal Revenue Code provides that any person who willfully fails to make a return "at the time or times required by law" shall be guilty of a misdemeanor. As to 1975 and 1976, the evidence established that petitioner's tax returns for those years were due to be filed on or before April 15, 1976 and 1977 (Tr. 30, 39-40) and that petitioner did not file anything for those years until August 1977 (Tr. 39-40; Govt. Exs. 5, 6). Petitioner did not file anything on or before the due dates for returns for 1975 and 1976, and it, thus, cannot be disputed that he failed to file for those years. *United States* v. *Greenlee*, 380 F. Supp. 652, 660 (E.D. Pa. 1974), aff'd, 517 F.2d 899 (3d Cir.), cert. denied, 423 U.S. 985 (1975). See also *United States* v. *Bourque*, 541 F. 2d 290,

294 (1st Cir. 1976); *United States* v. *Ming*, 466 F. 2d 1000 (7th Cir.), cert. denied, 409 U.S. 915 (1972); *United States* v. *Cotter*, 425 F. 2d 450 (1st Cir. 1970).[5]

It is well established that the privilege against self-incrimination does not permit a taxpayer to refuse to make any return at all. *United States* v. *Sullivan*, 274 U.S. 259, 263 (1927). Petitioner's failures could therefore not be excused by his Fifth Amendment privilege against self-incrimination. Indeed, even on the assumption that the materials petitioner filed in August, 1977, could be considered tax returns, a late filing does not satisfy the requirement of filing a tax return on or before the due date and is not a defense to a failure to file charge under Section 7203. *United States* v. *Greenlee*, *supra*, 380 F. Supp. at 660.

At all events, a Form 1040 that does not supply any information from which a tax liability can be computed is not a proper tax return for purposes of the filing requirements of the Internal Revenue Code. *United States* v. *Irwin*, 561 F. 2d 198, 201 (10th Cir. 1977), cert. denied, 434 U.S. 1012 (1978); *United States* v. *Radue*, 486 F. 2d 220, 222 (5th Cir. 1973), cert. denied, 416 U.S. 908 (1974); *United States* v. *Porth*, 426 F. 2d 519, 523 (10th Cir.), cert. denied, 400 U.S. 824 (1970). None of the materials

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[5]The trial judge instructed the jury that the information charged petitioner with failing to file tax returns on or before April 15 of the year following the taxable year (Tr. 269-271) and that Section 7203 made the willful failure to file a tax return at the time required by law a criminal offense (Tr. 271).

petitioner filed (either the purported 1974 tax return[6] or the materials filed in August 1977) supplied any information from which his tax liability could be computed.

2. Petitioner nevertheless argues (Pet. 29-30) that he properly invoked his privilege against self-incrimination and refused to supply any information on the forms because of the possibility that such information could have been used to incriminate him for filing withholding exemption certificates in which he asserted that he had not incurred any tax liability for the years for which tax returns were due. But the burden of establishing entitlement to claim the privilege is upon the one asserting it. *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951). Here, the court of appeals properly determined (Pet. App. iv-v) that there was sufficient evidence before the jury from which it could conclude that petitioner had not established that his actions were motivated by a specific fear of prosecution for filing false withholding exemption certificates but that his claim was a mere after thought.

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[6]Under the facts of this case, petitioner was not entitled to claim the Fifth Amendment privilege on the purported tax return he filed prior to April 15, 1975 (Govt. Ex. 3). The only withholding exemption certificates which related to this document were filed on August 19, 1974; June 23, 1975; July 24, 1975; and December 17, 1975. The certificate filed in 1974 stated that petitioner incurred no tax liability in 1973 and anticipated no tax liability in 1974. Had petitioner revealed in the purported 1974 tax return filed in 1975 that he had in fact incurred a tax liability in 1974, that return could not have been used to show that petitioner falsely stated in 1974 that he anticipated no tax liability for that year. The certificates filed in 1975 stated that petitioner incurred no tax liability in 1974 and anticipated none in 1975. But each of these certificates were filed after petitioner filed his purported return for 1974. Surely petitioner could not claim the privilege and refuse to supply information from which a tax liability could be computed on the ground that he intended in the future to state falsely that he had incurred no tax liability in 1974.

It is undeniable that the words "Object—Self-incrimination" were inserted in the blanks on the Form 1040 for the 1974 tax year calling for the petitioner's occupation, the wages received, the computation of tax and the taxes due (Govt. Ex. 3). But there was nothing in the attachments to the form, which revealed a general opposition to the taxing system, indicating that petitioner was invoking the privilege because he feared he would incriminate himself as to any specific violation. Moreover, when Agent Bjorn asked petitioner why he had filed an incomplete return, he stated that he had done so because he did not "believe in paying taxes on taxes" and because "he felt that taxes were unconstitutional" (Tr. 108-109), not that he feared incrimination from a complete response.

The materials filed by petitioner in August, 1977, contained the word "Object" in the blanks calling for occupation, wages received, computation of tax and taxes due (Govt. Exs. 4-6). But the word "Object" was also inserted in every other blank but one, and the materials were not signed or dated. Numerous objections to the taxing system were raised in the materials attached to these forms, and although the Fifth Amendment was one of the objections asserted, the affidavit in which petitioner stated his Fifth Amendment claim in some detail did not mention a fear of incrimination with respect to withholding exemption certificates but instead asserted only that petitioner feared he could be incriminated if he filled out the Forms 1040 because the Internal Revenue Service could find something wrong with any return and because he believed that he might be prosecuted for perjury if he filled out his tax returns according to his understanding of the term "dollar". (See Attachments to Govt. Exs. 4-6.)

From all of this evidence, the jury could have reasonably concluded[7] that petitioner filed incomplete Forms 1040 (Govt. Exs. 3-6) not because he feared prosecution for filing false withholding exemption certificates, but because he objected generally to the taxing system and was trying to evade his duty to file tax returns and pay taxes.[8]

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[7]The trial court instructed the jury, in part, as follows (Tr. 277-278):

> You are instructed that a valid and timely claim of the Fifth Amendment privilege or a claim of privilege made in good faith, but erroneously may negate the element of willfulness * * *.
>
> It, therefore, is the duty of the jury to determine whether or not the reason for the Defendant's claim of the Fifth Amendment was based on a good faith mistake or on a real possibility of criminal prosecution or whether the Defendant's refusal to supply information on grounds of claim of privilege was willful, that is, was motivated by some bad purpose such as a desire to impede, harass, delay, or evade the payment of taxes.
>
> * * * * *
>
> * * *The failure to make a timely return is willful if the Defendant's failure to act was voluntary and purposeful and with specific intent to fail to do what he knew the law requires to be done; that is to say, with a bad purpose or motive or [*sic*] disobey or disregard the law, which requires him to file a timely return which discloses to the Government the facts material to the determination of his income tax liability.
>
> * * * * *
>
> On the other hand, the Defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accidents, or reckless disregard for the requirements of law, or due to his good faith misunderstanding of the requirements of the law.

[8]Petitioner also argues (Pet. 20) that the validity of a claim of privilege is not a question for the jury unless the claim is erroneous. But even if this is the case, allowing the jury to pass on both the validity and the good faith exercise of the privilege gave petitioner more than he was entitled to. Because the evidence established that petitioner had not in good faith invoked the privilege against self-incrimination, there is no need for this Court to consider whether the court of appeals correctly held that the privilege against self-incrimination does not permit a taxpayer to avoid disclosure of information on a tax return from which the tax liability for the year can be determined. See *Garner* v. *United States*, 424 U.S. 648 (1976); *California* v. *Byers*, 402 U.S. 424 (1971).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
Attorney

OCTOBER 1979

DOJ-1979-10